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No. 86-1728

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEO CAHOON,
Appellant,

vs.

ALTON PACKAGING CORPORATION,
JEFFERSON SMURFIT CORPORATION, and
JEFFERSON SMURFIT GROUP, LTD.,
Appellees.

On Appeal From The Appellate Court
of Illinois, Fifth District

REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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This Court has jurisdiction, which should be exercised in order to correct a rulng which has significant repercussions, not only for victims of civil rights deprivations, but for all persons asserting a claim under any federal law where state jurisdiction is authorized. Defendants' argument that plaintiff did not properly raise the constitutional question presented is in error as plaintiff did raise the constitutional question in the Appellate Court in his Appellee's Brief. In addition, the decision of the Illinois Appellate Court rested upon a basis not before it and not argued by defendants (exhaustion of administrative remedies), and therefore was an unanticipated act.

A review of both defendants' and plaintiff's argument in the Appellate Court, Appendices A and B of Motion To Dismiss Appeal Or To Affirm The Judgment Of The State Court, will reflect that exhaustion of administrative remedies was not the issue raised by defendants; rather, subject matter jurisdiction was the issue raised and addressed by plaintiff in response. Plaintiff endeavored to illustrate to the Appellate Court in his brief that Illinois trial courts did have subject matter jurisdiction of ADEA claims. Admittedly, plaintiff did not dwell upon, or discuss in depth, the constitutional ramifications of a decision contrary to his position since the law on the point quite clearly and overwhelmingly favored his position that state courts are vested with subject matter jurisdiction of ADEA claims. Nevertheless, plaintiff did specifically state at that time that the Illinois legislature did not have the authority to take away plaintiff's substantive rights as created by the Congress, and therefore could not enact legislation that prohibited its courts from hearing a claim which Congress said it should hear:

> The Illinois legislature has no authority to restrict, overrule, or otherwise reject substantive rights created by the United States Congress. *Parks v. Illinois Department of Mental Health,* 110 Ill.App.3d 184, 441 N.E.2d 1209 (1st Dist. 1982). *Page 2 of Appellee's (Cahoon's) Brief before the Illinois Appellate Court, Motion to Dismiss Appeal or to Affirm the Judgment of the State Court at App. 10.*

A review of the opinion in *Parks v. Illinois Dept. of Mental Health,* 110 Ill.App.3d 184, 441 N.E.2d 1209, 1211 (1st Dist. 1982) reveals that no provision of a constitution other than Article VI, Section 2 of the United States Constitution (the Supremacy Clause) was at issue or discussed in that opinion, and therefore there could be no doubt to defendants or to the Appellate Court that the basis of plaintiff's argument was the Supremacy Clause.

In fact, the Appellate Court itself in the second full paragraph from the end of its opinion specifically refers to plaintiff's argu-

ment and summarily dismisses same, first by concluding that the ADEA "does not appear to support a preemption argument", and then by concluding that plaintiff "does not expressly argue preemption". *Cahoon v. Alton Packaging Co.,* 148 Ill.App.3d 480, 499 N.E.2d 522, 524 (5th Dist. 1986). However, such statements by the court are merely self-serving statements used to boot-strap its position.

It must be emphasized that at the time subject matter jurisdiction was first raised by defendants, in their Appellants' Brief in the Appellate Court, it was but one of approximately eight issues presented for review following the trial, which necessarily limited the depth of the discussion. Nevertheless, contrary to defendants' position, the issue of subject matter jurisdiction was directly confronted, and the constitutional question asserted.

Where the federal question is created by an unanticipated act of the state court, then it is raised in a timely fashion even though it is raised for the first time in a petition for rehearing. *Brinkerhoff-Farris Trust Co. v. Hill,* 281 U.S. 673, 677-78 (1930); *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 85-86, n. 9 (1980). In the event that this Court determines that the constitutional issue was not adequately raised in plaintiff's Appellate Court Brief, plaintiff submits that any such inadequacy was the result of the unanticipated determination by the Appellate Court that exhaustion of administrative remedies was a condition precedent to state court subject matter jurisdiction. Such a decision was not contemplated primarily because it was not argued, but also because of this Court's decision in *Oscar Mayer & Company v. Evans,* 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979). Appellees' suggestion that plaintiff was on notice to anticipate this unlikely ruling because of *Mein v. Masonite Corporation,* 109 Ill.2d 1, 485 N.E.2d 312, 92 Ill.Dec. 501 (1985) and *People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corporation,* 122 Ill.App.3d 517, 461 N.E.2d 505, 77 Ill.Dec. 882 (1st Dist. 1984)

is unsupportable. Neither case had anything to do either with the federal ADEA or with exhaustion of administrative remedies. *Mein v. Masonite Corporation,* 109 Ill.2d 1, 485 N.E.2d 312, 92 Ill.Dec. 501 (1985) was not brought under any state or federal statute, but rather was a retaliatory discharge case alleging that plaintiff's dismissal in retaliation for age was violative of the public policy of the State of Illinois. The Illinois Supreme Court held that plaintiff's complaint failed to state a cause of action.

Equally misplaced is appellees' reliance on *People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corporation,* 122 Ill.App.3d 517, 461 N.E.2d 505, 77 Ill.Dec. 882 (1st Dist. 1984). In this case, the cause of action was expressly filed under the Illinois Human Rights Act by the Illinois Department of Human Rights, and the court properly found jurisdiction under that Act to be in the administrative agency.

Defendants now question this Court's jurisdiction to hear plaintiff's claim, just as they originally questioned the Illinois Human Rights Commission's subject matter jurisdiction and just as they questioned the Illinois Circuit Court's subject matter jurisdiction (on appeal after the trial). The single time plaintiff was able to have his case considered on the merits (in the trial court), he prevailed. The Illinois appellate courts have made it clear, by the Appellate decision and by the subsequent two refusals to hear the case further, that they do not consider either the substance of this plaintiff's case or the closing of its courts to federal claims to be a significant or worthwhile issue. However, if this decision is allowed to stand, there is not reason why its application will not be applied across the board, as advocated by defendants, to exclude jurisdiction in Illinois courts for claims brought under any federal civil rights statute, whether the ADEA; Title VII; 42 U.S.C. §1981 or 42 U.S.C. §1983; or The Fair Labor Standard Act. Similar state legislation could also be enacted to foreclose suits under other federal acts such as the Jones or Federal Employers Liability Acts.

It is respectfully requested by Leo Cahoon that this Court note probable jurisdiction of this appeal, and deny defendants' motion.

Respectfully submitted,

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